STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of ILENE JENNINGS.

CRAIG WRIGHT, Personal Representative of the Estate of ILENE JENNINGS,

Appellee,

and

ROSE LABARGE, a/k/a ROSE YARRINGTON,

Appellant,

v

JOHN JENNINGS,

Appellee.

UNPUBLISHED
July 28, 2011

No. 298063
Genesee Probate Court
LC No. 10-187640-DE

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Appellant Rose LaBarge appeals as of right from a probate court order admitting the decedent's 2008 will to probate. For the reasons set forth in this opinion, we affirm the rulings of the probate court.

Appellant is the stepdaughter, and appellee John Jennings is the son, of the decedent, Ilene Jennings. Ilene left two wills, one dated June 27, 1980, and one dated April 24, 2008. The 1980 will directed that Ilene's assets be divided equally between appellant and Jennings. The 2008 will directed that Ilene's assets go to John alone unless he predeceased her. Appellant filed a petition to have the 1980 will admitted to probate and Jennings filed a petition to have the 2008 will admitted to probate. Appellant objected, contending that Ilene was not competent to make a will in 2008, and that she did so only because she was coerced by Jennings. The probate court set a trial date to determine the validity of the 2008 will. Appellant appeared for trial and requested an adjournment, which was denied. Because appellant was not prepared to present any evidence, the probate court dismissed her objections to Jennings's petition and admitted the 2008 will to probate.

Appellant first argues that the probate court erred by failing to hold a pretrial conference and issue a scheduling order as required by the court rules. The construction, interpretation, and application of the court rules is a question of law that is reviewed de novo on appeal. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003); *Kernen v Homestead Dev Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002).

Contested proceedings in probate court are governed by MCR 2.401. MCR 5.141. MCR 2.401(A) provides that the court, on its own initiative or at the request of the parties, "may" hold an early scheduling conference. At such a conference, "the court shall establish times for events the court deems appropriate," including the time for the filing of motions, completion of discovery, and exchange of witness lists. MCR 2.401(A), (B)(1), and (B)(2)(a). The use of the term "may" denotes permissiveness and is indicative of discretion. *In re Forfeiture of Bail Bond*, 276 Mich App 482, 492; 740 NW2d 734 (2007). Therefore, the probate court had the discretion to hold a pretrial scheduling conference and issue a scheduling order, but it was not required to do so. Additionally, MCR 2.501 states that if the court has not issued a scheduling order under MCR 2.401, it shall (1) schedule a pretrial conference, (2) set the case for alternative dispute resolution, (3) set the case for trial, or (4) enter any other appropriate order to ready the case for trial. MCR 2.501(A). In other words, the court's obligation under MCR 2.501(A) is "to enter whatever orders are necessary to bring the action to trial . . . ." 3 Longhofer, Michigan Court Rules Practice (5th ed), § 2501.2, p 5. In this case, the probate court chose the third option of setting the case for trial and gave the parties 28 days' oral notice. See MCR 2.501(C). Hence, the probate court, by ordering the matter to trial, did not violate any of the court rules cited by appellant.

Appellant next argues that the probate court erred by failing to provide for discovery. A trial court's decision to grant or deny discovery is reviewed for an abuse of discretion. *Mercy Mt Clemens Corp v Auto Club Ins Ass'n*, 219 Mich App 46, 50; 555 NW2d 871 (1996). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Discovery in probate cases is governed by the rules applicable to civil actions in the circuit court, MCR 2.300 *et seq*. MCR 5.131(A) and (B). MCR 2.301(A) states that "the time for completion of discovery shall be set by an order entered under MCR 2.401(B)(2)(a)." As previously discussed, however, the issuance of a scheduling order is permissive, not mandatory. Therefore, if the court elects to issue a scheduling order, it is required to include in that order a discovery cut-off date. Thus, MCR 2.401 establishes a date upon which discovery must be complete. Until or unless the court establishes such a date, discovery may continue until an order of the court. Contrary to the assertions of appellant, the probate court did not fail to provide for discovery. Appellant was allowed to conduct discovery until the trial date and the documents appended to her motion for a new trial show that she took advantage of the discovery process by noticing Jennings's deposition and requesting documents from various persons and institutions. Prior to the trial date, appellant did not seek an order from the probate court extending time for discovery. We therefore reject this claim of error.

Appellant lastly argues that the probate court's actions violated her due process rights. This issue has not been preserved for appeal because appellant did not raise any due process claim in the probate court. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741

NW2d 61 (2007). Therefore, "review is limited to determining whether a plain error occurred that affected substantial rights." *In re Egbert R Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007), aff'd 480 Mich 19 (2008). The basis for appellant's due process claim is unclear. Appellant was afforded procedural due process as she had notice of the trial date and an opportunity to present her case to the probate court. To the extent we can discern appellant's assertions on this issue, we can only surmise that appellant was not prepared to proceed to trial because she was under a mistaken belief that the probate court would grant an adjournment. Thus we are left to conclude that appellant's due process claims are grounded in her assertion that the probate court should have granted an adjournment.

A motion to adjourn must be based on good cause. MCR 2.503(B)(1). If a party seeks an adjournment due to the unavailability of a witness or evidence, the party must make the motion "as soon as possible after ascertaining the facts." MCR 2.503(C)(1). Such a motion may be granted "only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence." MCR 2.503(C)(2). "A denial because of the absence of a witness is proper where the movant fails to provide an adequate explanation and show that diligent efforts were made to secure the presence of the witness." *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992).

Appellant did not clearly state in her motion what evidence or witnesses she needed time to discover and produce and why the evidence or testimony was material to her claim that Ilene lacked sufficient mental capacity or was coerced to execute a will in April 2008. At the hearing, appellant's counsel stated that it had taken a long time for banks to respond to subpoenas for documentation regarding Ilene's accounts, but obviously if the banks had responded, the documentation was not unavailable. Further, it is unclear how any documentation in the possession of any bank would be material to appellant's central claim that Ilene lacked sufficient mental capacity or was coerced to execute a will in April 2008.

Appellant's counsel also referred to the inability to take Jennings's deposition, but it appears that he sought to depose Jennings to "figure out who to subpoena[.]" Given that the subpoenas had been issued, it was no longer necessary to get the same information from Jennings and appellant did not disclose what other information, if any, she needed from Jennings.

Appellant's counsel also referred to the inability to produce doctors to testify in court, but did not explain what testimony he expected the doctors to offer that was material to appellant's claim. Nor did he show that he had made diligent efforts to secure the doctors' attendance at trial. The documentation offered to the court showed that on March 16, 2010, appellant had obtained subpoenas for several witnesses to appear for the trial, but there is nothing in the record to show whether those subpoenas were ever served and, if so, whether appellant knew before March 22 that the witnesses would not appear.

Given the circumstances of the case, the probate court did not abuse its discretion by declining to do so because appellant failed to show good cause for an adjournment. Accordingly, appellant has failed to show a plain error.

Affirmed. Appellee, being the prevailing party may tax costs, MCR 7.219.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter